

NOT FOR PUBLICATION**OCT 14 2004**

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD B. WILDIN,

Petitioner - Appellant,

v.

S. FRANK THOMPSON,

Respondent - Appellee.

No. 03-36029

D.C. No. CV-99-00204-AA

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted September 17, 2004
Portland, Oregon

Before: WALLACE, GOULD, and BEA, Circuit Judges.

Petitioner Richard Bruce Wildin was convicted by a jury of first degree manslaughter in Oregon state court on June 23, 1995. He was sentenced to 5 years imprisonment and 36 months post-prison supervision. He now appeals the district court's denial of his habeas petition challenging his conviction on the ground that

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he was denied the effective assistance of counsel because his trial counsel failed to test physical evidence seized at the crime scene and he was prejudiced thereby.

We affirm the decision of the district court.

We review a district court's decision to deny a 28 U.S.C. § 2254 habeas petition *de novo*. See *Taylor v. Maddox*, 366 F.3d 992, 997 (9th Cir. 2004).

Habeas relief may be granted if a state court's decision "[w]as contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

To establish ineffective assistance of counsel, petitioner must prove: (1) that "counsel's performance was deficient" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

We conclude that the decision of petitioner's counsel not to have the blood on the victim's t-shirt and the petitioner's coat and van bumper independently tested was a "reasonable" tactical decision under the circumstances.

Even if counsel's decision not to test the physical evidence was not reasonable, petitioner did not prove that he was prejudiced thereby.

Accordingly, we AFFIRM the decision of the district court.